No. 5744

United States Circuit Court of Appeals

For the Ninth Circuit

ELECTRIC STEEL FOUNDRY, a Corporation,
Appellant,

vs.

CLYDE G. HUNTLEY, as Collector of United States Internal Revenue for the District of Oregon, and W. S. SHANKS, as Deputy Collector of United States Internal Revenue for the District of Oregon,
Appellees.

Brief of Appellant

Upon Appeal from the United States District Court for the District of Oregon.

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STATEMENT OF THE CASE.

This is a suit in equity brought by appellant, Electric Steel Foundry, an Oregon corporation, doing business in the City of Portland, Oregon, against appellees, Clyde G. Huntley and W. S. Shanks, who are the Collector and Deputy Collector respectively of United States Internal

Revenue for the District of Oregon, to set aside and cancel and hold for naught a certain purported income and profits tax waiver which said appellees on September 26, 1925, induced and procured the secretary of said appellant, Geo. F. Schott, to sign in its behalf.

It is alleged in appellant's bill of complaint, which is set forth in full from pages 4 to 15, both inclusive, of the transcript of record, that said purported income and profits tax waiver should be canceled and annulled and held for naught for the reasons that the collection of the income tax in question was, under the existing Internal Revenue Acts of the United States and the decisions of the courts construing and applying said revenue acts, barred by the statute of limitations, and that the said purported income and profits tax waiver should be canceled and annulled and held for naught because said appellees fraudulently and wrongfully and in violation of law, and in excess of their legal rights and duties, and by means of duress coerced and compelled the said secretary of appellant to sign the said purported income and profits tax waiver, which appellant seeks by this suit to have voided and set aside.

The said purported income and profits tax waiver relates to the federal income tax of said appellant for the year, 1918, and we will here set down for the convenience of the court, in chronological order, everything that has transpired since the accrual of said tax for said year, 1918, up to the present time, so far as the same is germane to the decision of the questions presented by this appeal. It will develop in the course of the argument of the questions presented by this appeal that the dates hereinafter stated are of very vital and significant importance, especially as the same relate to the contention of appellant that the collection of any further income taxes of said appellant

for said year, 1918, is absolutely barred by the statute of limitations.

On May 9, 1919, appellant duly filed its income tax return for the said year, 1918, showing a tax due the United States of $345,095.39, and on July 24, 1919, said sum was assessed by the United States as the tax due, of which appellant paid $217,592.11, leaving a balance of $127,503.28, and appellant thereupon filed a claim of abatement of said balance;

On January 22, 1924, appellant and the United States Commissioner of Internal Revenue entered into a certain waiver agreement in words and figures as set forth at pages 7 and 8 of the transcript of record. Under said last mentioned waiver agreement it was provided that the period of time within which the United States might collect any additional assessment under said 1918 tax return of appellant was extended beyond the statutory period of limitation *but in no event beyond the express limited date therein specified, namely, March 15, 1925;*

No other or further assessment or determination of the income taxes due or claimed to be due under said return, made as aforesaid on May 9, 1919, was made until February 8, 1924, when the United States Commissioner of Internal Revenue levied and assessed an additional tax on said return of $51,556.79, and on December 8, 1924, an abatement of the said balance of $127,503.28 in the sum of $24,970.08 was allowed by the Internal Revenue Department of the United States;

Although under the internal Revenue Acts applicable to the collection from appellant of the income taxes due or claimed to be due and payable from said appellant to the United States for said year, 1918, as construed and applied by the decisions of the courts, the collection of the

said two assessments, which were made, as aforesaid, within five years from the date of the filing of the return, was barred by the statute of limitations five years after the date when said appellant filed its said income tax return for said year, 1918, which would be five years from said May 9, 1919, or May 9, 1924, said appellee, Huntley, on September 25, 1925, or more than sixteen months after the collection by the United States government from said appellant of said income taxes for said year, 1918, was barred by the statute of limitations, acting through his deputy, Cochran, wrongfully and unlawfully, and in excess of his legal rights and authority—the collection of any further income taxes for said year, 1918, being already barred by the statute of limitations—issued to appellee, Shanks, a distraint warrant (a substantial copy of which is set forth at pages 13 to 15 both inclusive of the transcript of record), commanding said appellee, Shanks, to collect said alleged balance of taxes for said year, 1918, amounting to said sum of $127,503.28 and interest thereon amounting to $44,607.07 aggregating $172,110.35, and to distrain the property of appellant for said purpose, notwithstanding the fact that the collection of said income taxes for said year, 1918, so sought to be collected, became barred by the statute of limitations on May 9, 1924.

And on September 26, 1925, said appellee, Shanks, served said distraint warrant, wrongfully issued as aforesaid, upon appellant's said secretary, and at the same time handed to the latter the said purported income and profits tax waiver, which appellant seeks by this suit to have cancelled and annulled and held for naught;

The said purported income and profits tax waiver which appellant seeks to have voided and cancelled by this suit was signed on September 26, 1925, by the said secre-

tary of appellant, and although the same is set forth in full from pages 5 to 6 of the transcript of record it will, for convenience, be here set forth again. Said purported income and profits tax waiver is in words and figures as follows:

"September 26, 1925

"Income and Profits Tax Waiver.

"In order to enable the Bureau of Internal Revenue to give thorough consideration to any claims for abatement or credit filed by or on behalf of Electric Steel Foundry of Ft. of Salmon St., Portland, Oregon, covering any income, excess-profits or war-profits tax assessed against the said taxpayer under the existing or prior Revenue Acts for the year(s)—1918—, and to prevent the immediate institution of a proceeding for the collection of such tax prior to the expiration of the six year period of limitation after assessment within which a distraint or a proceeding in Court may be begun for the collection of the tax, as provided in Section 278 (d) of the existing Revenue Act, the said taxpayer hereby waives any period of limitation as to the time within which distraint or a proceeding in Court may be begun for the collection of the tax, or any portion thereof, assessed for the said year(s), and hereby consents to the collection thereof by distraint or a proceeding in Court begun at any time prior to the expiration of this waiver. This waiver is in effect from the date it is signed and will remain in effect until December 31, 1926. (Signed) Electric Steel Foundry, Taxpayer, by Geo. F. Schott, Sect. (Corporate Seal);"

It is alleged in appellant's bill of complaint, and all of the facts therein alleged must be taken and conclusively deemed to be true and absolutely binding upon the court in its determination of the merits of this appeal, that not only was the issuance of said distraint warrant unlawful and in excess of the rights and duties of said appellee,

Huntley, and in positive violation of the rights of said appellant, but that said purported income and profits tax waiver was at the time of its execution absolutely void and ineffectual upon its face for the reason that the collection of any further income taxes from said appellant for said year, 1918, was absolutely barred by the statute of limitations, and that the said secretary of appellant was fraudulently and wrongfully induced and procured and by duress coerced into signing said alleged waiver in behalf of appellant.

The bill of complaint sets forth in detail the facts upon which it is claimed that said secretary was fraudulently and wrongfully induced and procured and coerced into signing said alleged waiver, and among other facts alleged and set forth in appellant's bill of complaint are the following:

That when said appellee, Shanks, served said distraint warrant on September 26, 1925, he demanded of said secretary of appellant that the latter immediately pay the amount of said distraint warrant, to wit, the sum of $172,-110.35, or as an alternative that he, the said secretary, sign and seal said alleged waiver of date September 26, 1925, on behalf of appellant, and, thereupon, said appellee, Shanks, threatened said secretary that unless he immediately complied with one or the other of said demands that he, said appellee, Shanks, under said distraint warrant, would take possession of the plant, factory and property of appellant and forthwith sell the same to recover the amount of said warrant;

That said secretary asked of said appellee, Shanks, a reasonable time to consult appellant's legal advisers, but the same was refused; he then asked time until the next

day when the President and executive head manager of appellant would be present—he being absent from the city of Portland at that time—and the matter could be submitted to him, but that request was likewise refused;

That appellant was then the owner and in possession of valuable property consisting of its foundry, factory, buildings, furnishings, equipment, tools and implements, as well as a large stock of raw materials and manufactured products, all being in Portland, Oregon, and being the plant and instrumentalities with which appellant carried on its business, and all of great value, but which under forced sale by said Collector, under said distraint warrant, would not realize or bring more than one-third of its actual value, all of which was then well known to said secretary;

That said secretary also then well knew, and it was and is a fact, that the carrying out of said threat of taking possession of said property by said appellee, Shanks, and selling the same thereunder, would ruin appellant and render it insolvent, and the effect of said threat was to deprive said secretary of any ability to act according to his own will and judgment, and so frightened and scared said secretary that he permitted said appellee, Shanks, to substitute his will for that of said secretary and compel said secretary to act contrary to his own wishes and will and according to that of said appellee, Shanks, and thereupon said secretary without any authority whatever from the board of directors of appellant or from the President or manager of appellant, but solely by reason of the said threat of said appellee, Shanks, signed and sealed said alleged waiver which appellant seeks to have voided and canceled by this suit;

That appellant has not at any time authorized the execution of said alleged waiver agreement by said secretary, and has not ratified or confirmed the same in any way.

The facts that the signing of said alleged waiver agreement was procured as a result of the fraudulent and wrongful acts and practices of said appellees, and because of their coercion and duress conclusively appear from the facts that the issuance of said distraint warrant and the exaction of said alleged waiver agreement occurred at a time when the collection of any further income taxes from appellant for the said year, 1918, was absolutely barred by the statute of limitations, and in the bill of complaint, to which reference is hereby made, there are set forth and alleged the various revenue acts of the United States applicable to the collection of taxes for the said year, 1918, from which it conclusively appears that the collection of any further taxes for said year, 1918, was absolutely barred by the statute of limitations. We will not at this point further refer to said internal revenue acts or to the decisions of the courts construing and applying the same, but they will be considered at further length in the argument contained in this brief.

No additional or other assessments or determination of taxes due or claimed to be due under said return for said year, 1918, was ever made. In concluding and summarizing the allegations of appellant's bill of complaint it is the contention of appellant that full and sufficient allegations are contained therein showing that the alleged waiver agreement should be cancelled and annulled, and set aside, for the reasons that it is void and ineffectual upon its face because executed at a time when the collection of any fur-

ther income taxes for the year, 1918, was barred by the statute of limitations, and for the further reasons that the signature of the secretary of appellant to said alleged waiver agreement was procured as a result of the fraudulent and wrongful conduct and duress and intimidation practised upon said secretary by said appellees.

To said bill of complaint, containing the material allegations aforesaid, appellees filed a motion to dismiss upon the alleged ground and for the alleged reason that the United States is an indispensable party defendant to this suit, and that the United States cannot be made a party defendant herein for the reason that it has not consented to be made such party defendant (page 15 Transcript of Record). Afterwards, to wit, on December 26, 1928, the District Court of the United States for the District of Oregon made and entered a decree herein sustaining said motion and dismissing said bill of complaint and providing that the appellees recover their costs and disbursements herein incurred (pages 19-21, Transcript of Record).

It is to reverse said final judgment and decree of December 26, 1928, sustaining the said motion to dismiss the bill of complaint herein, that this appeal is prosecuted, and the merits of this appeal and the decision thereof must be determined entirely from the sufficiency of appellant's bill of complaint, as challenged by appellees' motion to dismiss. No evidence or testimony was received in the cause, and the merits of this appeal must be determined entirely upon the two said pleadings, namely, the said bill of complaint and the said motion to dismiss the same. It is appellant's contention that, under the facts admitted by said motion to dismiss, the United States is not even a proper party defendant to this suit, much less a necessary

and indispensable party thereto, and that this suit should not be dismissed upon the ground contended for by appellees, namely, that the United States government has not been and cannot be made a party defendant herein.

SPECIFICATION OF THE ERRORS RELIED UPON

Appellant at the time of and contemporaneously with its filing of a petition for appeal herein made and filed an assignment of errors, which said assignment of errors is set forth at pages 23 to 26, both inclusive, of the transcript of record herein, reference to which is hereby made. As the greater number of the said assignments of error are predicated upon the opinion of the District Court and upon its reasons for sustaining appellees' motion to dismiss the bill of complaint and are not, therefore, available (Evans v. Suess Ornamental Glass Co., 83 Fed. 709; Stoffregen v. Moore, 271 Fed. 680; Mutual Reserve Fund Life Assn. v. DuBois, 85 Fed. 586) because the opinion of said District Court is no part of the record herein, they will not *in toto* be here repeated, but the principles therein expressed will be noticed and amplified later in the argument contained in this brief. By way of specifying the errors relied upon, appellant states and alleges:

(1) That the United States District Court for the District of Oregon erred in holding and decreeing that the United States is a necessary and indispensable party to this suit and since it cannot be sued that this suit should be dismissed;

(2) That the United States District Court for the

District of Oregon erred in sustaining appellees' motion to dismiss appellant's bill of complaint and in rendering and entering on the 26th day of December, 1928, a final order and judgment and decree in this suit, wherein and whereby it was ordered and adjudged that the bill of complaint herein be dismissed and that appellees recover of and from appellant their costs and disbursements incurred herein; and

(3) That the United States District Court for the District of Oregon erred in not denying appellees' motion to dismiss appellant's bill of complaint and in not holding and decreeing that, from the facts admitted by said motion and apparent on the face of the record, the United States Government had no right or title or interest in or to said waiver or the subject of this suit and was not a necessary or indispensable party thereto.

POINTS AND AUTHORITIES

I.

The contention that the United States is a necessary and indispensable party defendant to this suit might have been raised *by answer* and appellees were not required to raise said point of law by a motion to dismiss the bill of complaint.

Equity Rule 29, page 1125, Montgomery's Manual of Federal Jurisdiction and Procedure (3d Edition).

II.

A motion to dismiss admits all of the well pleaded allegations of the bill of complaint and they stand confessed. It is analogous to a demurrer and like it admits all the facts.

Woodall v. Clark, 254 Fed. 526.
Forbes v. Wilson, 243 Fed. 264.
Destructor Co. v. City of Atlanta, 219 Fed. 996.
Bayley v. Blumberg, 254 Fed. 696.
Painter v. Penn Mut. Ins. Co., 5 Fed. (2d) 1005.
McInnes v. American Surety Co., 12 Fed.(2d)212.
Gilbert v. Fontaine, 22 Fed. (2d) 657.

III.

The government is not liable for, or interested in, the torts or illegal acts of its officers or agents. If the acts be illegal or wrongful, in doing them the agents do not represent the government. They become personally liable to the injured party and proceedings may be brought against them by injunction to prevent a wrongful act or a suit may be brought against them to cancel and set aside their act and its effect, if already done.

39 Cyc. 748.
Hill v. U. S., 149 U. S. 593.
Gibbons v. U. S., 8 Wall. (U. S.) 269.
U. S. v. Cummings, 130 U. S. 452.
U. S. v. Lee, 106 U. S. 196.

IV.

When officers of the government act under invalid authority or exceed or abuse their lawful authority and thereby invade private rights secured by the Constitution, an action to redress injuries caused by the unauthorized act is not a suit against the government. The United States Government is not a necessary or indispensable party defendant to this suit. It being admitted by the motion to dismiss the bill of complaint that the waiver sought to be canceled was procured by the fraud and imposition and duress of appellees this suit may properly be maintained against them without joining the United States Government as a party defendant.

McComb v. U. S. Housing Corporation, 264 Fed. 589.

U. S. v. Lee, 106 U. S. 196.

Philadelphia Co. v. Stimson, 223 U. S. 605.

Tindal v. Wesley, 167 U. S. 204.

Lane v. Watts, 234 U. S. 525.

Payne v. Central Pac. Ry. Co., 255 U. S. 228.

Baker v. Swigart, 196 Fed. 569, opinion by former District Judge Rudkin.

Pennoyer v. McConnaughy, 140 U. S. 1.

Long v. Rasmussen, 281 Fed. 236, opinion by District Judge Borquin.

Wells v. Nickles, 104 U. S. 444.

Head v. Porter, 48 Fed. 481.

Osborn v. Bank, 9 Wheat (U. S.) 738.

Goltra v. Weeks, 271 U. S. 536.

Cunningham v. P. R. Co., 109 U. S. 446.

Poindexter v. Greenhow, 114 U. S. 270.

Chaffin v. Taylor, 114 U. S. 309.

Allen v. R. R. Co., 114 U. S. 311.

McGahey v. Virginia, 135 U. S. 662.

Thornhill Wagon Co. v. Noel, 17 Fed. (2d) 407.

V.

Under the law the appellees are responsible to the United States Government for the collection of income taxes. They have a vital and substantial interest in the outcome of this suit and are concerned in establishing the validity of said alleged waiver to avoid their own personal liability.

Revised Statutes, Secs. 3148, 3182, 3183 and 3187.

Act of February 8, 1875, c 36, Sec. 12, 18 Stat. 309.

VI.

Under the income tax statutes of the United States in effect and governing the collection of appellant's 1918 income taxes and the decisions of the courts thereunder said income tax is barred by the statute of limitations and the said waiver which appellant seeks to cancel by this suit is absolutely null and void upon its face and ineffectual for any purpose.

Bowers v. Lighterage Co., 273 U. S. 346.

U. S. v. Cabot, 5 Am. Fed. Tax Rep. 6172.

Joy Floral Co. v. Commissioner, 29 Fed. (2d) 865.

Russell v. U. S., 278 U. S. 181; 49 Sup. Ct. Rep. 121.

U. S. v. Harry Whyel, 19 Fed. (2d) 260.

Hood Rubber Company v. Thomas White, 28 Fed. (2d) 54.

Rasmussen v. Brownfield Carpet Co., IV U. S. Daily (March 12, 1929) p. 8, decided by U. S. Circuit Court of Appeals for the Ninth Circuit.

ARGUMENT

The three specifications of error relied upon by appellant for a reversal of the final decree rendered herein on December 26, 1928, all relate to the same point and will be considered and argued together. Said specifications of error present the very interesting question as to when and under what circumstances the United States government must be made a party defendant. If, as held by the District Court, the United States is a necessary and indispensable party defendant to this suit, said final decree must be affirmed. But should the court be of opinion that the United States is not a necessary and indispensable party defendant, said final decree should be reversed.

There is, as we view the facts and law of this suit, only one possible ground upon which this court might be justified in affirming the final decree of the District Court, and that is that this court should hold that as a matter of law the said alleged waiver agreement is absolutely void and ineffectual upon its face, and to an affirmance upon said limited and particular ground appellant has no objection, for all it is seeking to accomplish by this suit is to have set aside and canceled and held for naught the said alleged waiver agreement.

As matters now stand, said alleged waiver agreement can be urged by the United States government as a bar to appellant's contention that the statute of limitations has run against the collection of any further taxes for said year 1918, and it is to prevent the use of said alleged waiver agreement as a bar to appellant's contention that the statute of limitations has run against the tax that this suit was filed and this appeal is being prosecuted.

The motion of appellees to dismiss the bill of complaint is based entirely upon the alleged ground that the United States is a necessary and indispensable party defendant, and that therefore this suit cannot be maintained. The District Court in its said final decree took the said view and sustained the said motion to dismiss, based upon said ground, and we shall therefore at the outset of this argument consider the said question as to whether or not under the admitted facts shown by the record the United States is a necessary and indispensable party defendant.

(A) *Appellees' contention that the United States is a necessary and indispensable party defendant might have been raised by answer.*

Under equity rule 29 (p. 1125 Montgomery's Manual of Federal Jurisdiction and Procedure, 3rd Ed.), it is provided among other things that every defense in point of law arising upon the face of the bill, whether for misjoinder, *nonjoinder*, or insufficiency of fact, to constitute a valid cause of action in equity, shall be by motion to dismiss *or in the answer*. In other words, under said rule the contention which appellees make could have been made by answer and a preliminary hearing or trial been had in the District Court with respect to the truth of the allega-

tions contained in the bill of complaint. We call this minor matter of practice to the attention of this court that there may be no hesitancy on its part in declaring that appellees are absolutely bound by the averments of fact contained in appellant's bill of complaint. Having a choice of procedure under said rule appellees have elected to present the said matter of nonjoinder of the United States government by a motion to dismiss the bill of complaint rather than by an answer testing the truth of the averments of the bill of complaint.

(B) *Appellees' motion to dismiss the bill of complaint admits all of the well pleaded allegations thereof, and the same stand confessed.*

It is well settled beyond controversy, and as shown by the authorities cited by appellant under its points and authorities II that a motion to dismiss a bill of complaint in equity admits all of the well pleaded allegations thereof. Such motion is analogous to a demurrer, and like it admits all the facts.

In *Destructor Co. v. City of Atlanta,* 219 Fed. 996, the court said at page 1001:

> "There is a motion to dismiss the bill on various grounds. Of course, a motion to dismiss under the new equity rules must be construed in the same way a demurrer would be, that is, it concedes for the purposes of the motion to dismiss the truth of everything alleged in the bill that is well pleaded."

In *McInnes v. American Surety Co.,* 12 Fed. (2d) 212, the court said at page 215:

> "Upon motion to dismiss the allegations of the bill must be given their full, fair, legal intendment."

In *Gilbert v. Fontaine,* 22 Fed. (2d) 657, the court said at page 659: "The foregoing are the salient facts appearing in the bill. Upon the motion to dismiss, *and upon this appeal,* they must be taken to be true."

(C) *The United States is not a necessary and indispensable party defendant to this suit.*

In view of what we have heretofore said about the manner in which appellees' contention of insufficiency of the bill of complaint for nonjoinder of the United States as a party defendant was raised, namely, by motion to dismiss the bill of complaint rather than by answer, and the legal effect and consequences of such procedure, we enter upon the discussion of whether the United States is a necessary and indispensable party defendant with certain conclusively admitted facts. All of the material facts alleged in appellant's bill of complaint stand confessed upon the record, and this court is bound, in deciding said question, as to whether the United States is a necessary and indispensable party defendant to this suit, to assume that said material allegations are true.

It therefore stands admitted and confessed upon the record in this appeal that the collection of any further income taxes from appellant for the year, 1918, was absolutely barred by the statute of limitations and that the appellee, Huntley, in issuing said distraint warrant and directing said appellee, Shanks, to serve the same upon appellant was acting contrary to law and in violation of his legal rights and duties and in excess of his official authority, and that the procuring and exaction of the signing by the secretary of appellant of said alleged waiver agreement was likewise contrary to law and in violation of appellees' rights and duties and in excess of their official authority, and in violation of the constitutional rights and interests of appellant.

And it also stands admitted and confessed upon the record in this appeal that appellees wrongfully, fraudulently and unlawfully, and by threats and duress and in-

timidation and coercion, impelled and procured said secretary of appellant to execute said alleged waiver agreement. The admitted facts therefore present a situation where not only is the United States not a necessary or indispensable party to the suit, but a situation where, on the contrary, the United States government will refuse to have anything to do with the situation created by the said unlawful and fraudulent and wrongful acts committed by its officers in excess of their rights and duties, and will leave its officials to defend themselves and to atone for and justify their conduct as best they may.

It is well established that no government, either state or federal, can be made legally responsible and liable for the tortious acts of its officers or agents, and it might be well at the threshold of this discussion to call to the attention of this court a few of the many authorities announcing said rule:

In *Vol.* 39 *Cyc.* at page 748, it is said:

> "The government is never deemed guilty of a tort, and is not responsible for the tortious acts of its officers or agents generally, either of malfeasance or of nonfeasance, although apparently committed for its benefit while engaged in the discharge of official duties, and the United States have not by any statute permitted themselves to be sued for the torts of their officers."

In *Hill v. United States,* 149 U. S. 593, the court said at page 598: "The United States cannot be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers."

In *Gibbons v. United States,* 75 U. S. 269, the court said at page 274: "But it is not to be disguised that this case is an attempt under the assumption of an implied contract to make the government responsible for the un-

authorized acts of its officers, those acts being in themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers and agents."

In conclusion on this point, we direct this court to the opinion of Mr. Justice Harlan in U. S. v. Cummings, 130 U. S. 452, where it was distinctly held in a case arising out of the unlawful acts of revenue officers of the United States government that the government was not liable for the tortious acts of its said revenue officers, and had a right to interpose as a defense that such revenue officers had transcended the authority conferred upon them by law, and that the government was not liable or responsible therefor.

If from the admitted facts contained in the bill of complaint the action of appellees was unlawful and in excess of their official authority, and was committed under such circumstances as to make their action fraudulent and wrongful and tortious, and if under the admitted facts of the bill of complaint appellees practised coercion and intimidation and duress, and so conducted themselves as that the United States is not legally liable or responsible for their acts, and if, as announced by the authorities just quoted from, an action can never be successfully maintained against any government for the tortious and wrongful and unlawful acts of its officers and agents, then why should it be held that the United States government is a necessary and indispensable party defendant to this suit?

Of what avail would it be to appellant to join the United States as a party defendant? Had such course been pursued, the United States would ultimately and necessarily, under the admitted facts shown by the record, and under the law applicable thereto, been completely

discharged and exonerated. Why should appellant be required, as a matter of law, to join as a party defendant a party against whom he has no cause of action and whom he cannot legally hold responsible? And it being admitted that appellees are the sole parties responsible to appellant, and that they alone are liable and responsible to appellant, why should appellant not be permitted to continue its cause of suit against them?

By sustaining appellees' motion to dismiss the bill of complaint, the District Court from whose final decree this appeal is prosecuted set up an insuperable barrier against the obtaining by appellant of the relief to which it is equitably entitled, and the result of the final decree of the District Court in this suit, in its last analysis, is to hold and declare that wrongful and unlawful acts committed by officers of the federal government, if done under the guise of their apparent or assumed authority, are placed beyond inquiry and redress at the hands of a citizen whose rights and property have been invaded by such officers. There is no good reason, either in morals or in law, which should place any person, even though he be clothed with official authority, from responding in court for his fraudulent and wrongful and unlawful acts.

The principles for which appellant contends have been repeatedly announced in a long line of decisions beginning with the celebrated and leading case of United States v. Lee, 106 U. S. 196, and continuing without waver or deviation down to the present time. It has ever been held that when officers of the government act under invalid authority or exceed or abuse their lawful authority, and by their fraudulent and unwarranted and unlawful acts and conduct invade private rights, secured by the Constitution, an action to redress injuries caused by such unauthorized or

unlawful acts and to obtain relief therefrom is not a suit against the government. We will refer to and quote from a few of the many authorities sustaining appellant's position.

In said celebrated and leading case of United States v. Lee, decided by Mr. Justice Miller, which decision has not only not been reversed or modified, but is still adhered to and quoted from by the courts in subsequent decisions as being the settled law of the land, it was established by the verdict of a jury that the plaintiff had title to the land in controversy and that the United States did not have title, but it was contended that the court could render no judgment in favor of the plaintiff and against the defendants in said action because the latter held the property as officers and agents of the United States and the land was being appropriated to lawful public purposes.

The verdict of the jury in said case of U. S. v. Lee is analogous to the admitted facts of this suit as established by the admissions of the material allegations of appellant's bill of complaint, because in this present suit, just as in U. S. v. Lee, the United States has no property or other right or interest involved—the alleged waiver agreement sought to be voided being admittedly procured and obtained through fraud and wrongful conduct on the part of government officials claiming to act under but exceeding their lawful authority.

Time and space forbid further quotations than the following excerpts from said decision of *U. S. v. Lee,* 106 U. S. 196: At page 208 the court said: "Under our system the people * * * are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power,

or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property there is no reason why deference to any person, natural or artificial, *not even the United States,* should prevent him from using the means which the law gives him for the protection and enforcement of that right."

It was further said by the court at page 219: "The position assumed here is that however clear his rights (referring to plaintiff) no remedy can be afforded to him when it is seen that his opponent is an officer of the United States claiming to act under its authority, for as Mr. Chief Justice Marshall says, to examine whether this authority is rightfully assumed is the exercise of jurisdiction and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that the parties setting up such authority are lawfully possessed of it, for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion." The court then asks the very pertinent question, "But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?"

In conclusion the court states in said opinion that if the law as contended for by those opposed to the plaintiff is the law of this country, "it sanctions a tyranny which has no existence in the monarchs of Europe nor in any other government which has a just claim to well regulated liberty and the protection of personal rights."

In *Head v. Porter,* reported in 48 Fed. 481, which is also one of the leading cases on the subject under discus-

sion, and which quite thoroughly reviews the authorities, it was held that an officer of the United States in charge of a government armory may be sued in the circuit court for infringement of a patent, notwithstanding that all his acts in relation thereto were performed under the orders of the federal government. In concluding its opinion in said case the court said, at pages 488-9: "If, however, the principle established in the cases we have reviewed * * * are sound, it is difficult to see why the court has not jurisdiction in the present case. This is an action of tort for the infringement of a patent brought against an individual who is an officer or agent of the United States and whose defense is that he acted under orders of the government. That this is no defense in actions of this general character has, as we have seen, been repeatedly held by the supreme court, and the objection interposed that these suits are substantially against the government, and that therefore it is a necessary party to enable the court to grant relief, has been many times urged without avail."

In *McComb v. U. S. Housing Corporation,* 264 Fed. 589, it is stated at page 592, to be a general rule "That when officers of the government act under invalid authority or exceed or abuse their lawful authority and thereby invade private rights secured by the Constitution, an action to redress injuries caused by the unauthorized act is not a suit against the state."

The case of *Philadelphia Co. v. Stimson,* 223 U. S. 605, is peculiarly in point. In that suit the complainant sought to set aside certain harbor lines established by the Secretary of War in the harbor of Pittsburg, Pennsylvania, so far as they encroached upon land owned by the complainant, and in said suit it was further prayed that the Secretary of War be restrained from causing criminal

proceedings to be instituted against the complainant be cause of the reclamation and occupation of its land outside the prescribed limits.

In said suit it was claimed, as it is upon this appeal, that whatever was done by the Secretary of War was not personal to him but in furtherance of his official duties, and a demurrer to the bill of complaint was filed by the defendant in which it was asserted, among other things, that said proceeding was virtually a suit against the United States and that the United States, not being a party defendant, the suit could not be maintained. The District Court and the Circuit Court of Appeals affirmed the decree, sustaining the demurrer to the bill of complaint, and the matter came before the Supreme Court of the United States, in the face of two decisions sustaining a demurrer to the bill of complaint, asking that the decrees of the lower courts be reversed. In the opinion of the Supreme Court of the United States rendered by Mr. Justice Hughes it was said at pages 619-20:

> "If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded (citing authorities), and in case of an injury threatened by his illegal action the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments (citing authorities). And it is equally applicable to a federal officer acting in excess of his authority or under an authority not validly conferred (citing authorities). The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but chal-

lenged his authority to do the things of which complaint was made. *The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States.*"

In *Tindal v. Wesley,* 167 U. S. 204, the court asked the following questions in the course of its opinion as shown at page 212:

> "So that the question is directly presented whether an action brought against individuals to recover the possession of land of which they have actual possession and control is to be deemed an action against the state within the meaning of the Constitution, simply because those individuals claim to be in rightful possession as officers or agents of the state and assert title and right of possession in the state. Can the court in such an action decline to inquire whether the plaintiff is, in law, entitled to possession, and whether the individual defendants have any right, in law, to withhold possession? And if the court finds, upon due inquiry, that the plaintiff is entitled to possession, and that the assertion by the defendants of right of possession and title in the state is without legal foundation, may it not, as between the plaintiff and the defendants, adjudge that the plaintiff recover possession?"

The court answered all of said questions in the affirmative, basing its decision upon said case of U. S. v. Lee and subsequent decisions. Speaking of said Lee case the court said at page 281:

> "The essential principles of the Lee case have not been departed from by this court, but have been recognized and enforced in recent cases."

In *Lane v. Watts,* 234 U. S. 525, a demurrer was filed to the bill of complaint to the effect, among other things, that if the legal title to the land involved in said suit had not passed to the plaintiffs as alleged, it was still in the United States which have not consented to the suit, leav-

ing the court without jurisdiction. It was further directly charged in said demurrer that the determination of the suit affects the United States, and they are really indispensable parties in interest and have not consented to be sued. The demurrer was overruled and upon appeal such ruling was sustained, the court saying at page 540:

> "The suit is one to restrain the appellants from an illegal act under color of their office, which will cast a cloud upon the title of appellees. This disposes of the contentions of appellants that this is a suit against the United States or one for recovery of land merely, or that there is a defect of parties, or that the suit is an attempted direct appeal from the decision of the Interior Department, or a trial of a title to land not situated within the jurisdiction of the court wherein an essential party is not present in the forum and is not even suable—the United States."

Payne v. Central Pacific Ry Co., 255 U. S. 228, was a suit to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from canceling a selection of indemnity lands under the Railroad Land Grant. The trial court dismissed the bill of complaint, and the Circuit Court of Appeals, to which the suit was carried, reversed that decree and directed that an injunction should issue. Upon a further appeal to the Supreme Court of the United States the decree of the circuit Court of Appeals was affirmed, the court basing its opinion in part upon said case of Philadelphia Co. v. Stimson, 223 U. S. 605, and stating at page 238 as follows:

> "We are asked to say that this is a suit against the United States and therefore not maintainable without its consent, but we think the suit is one to restrain the appellees from canceling a valid indemnity selection through a mistaken conception of their authority and thereby casting a cloud on the plaintiff's title."

Pennoyer v. McConnaughy, 140 U. S. 1, was a suit in equity by the appellee, a citizen of California, against the appellants, who under the Constitution of Oregon as Governor, Secretary of State and Treasurer of the State, comprised the Board of Land Commissioners of the State, to restrain and enjoin them from selling and conveying a large amount of land in that state to which the appellee asserted title. There was a demurrer to the bill on the alleged ground that the suit was practically against the State and was therefore prohibited by the Eleventh Amendment to the Constitution. The Supreme Court of the United States refused to sustain said contention and held, as shown at page 10 of the opinion, that the suit in question came within one of the well defined and recognized classes of cases wherein a suit might be maintained without joining the government. Speaking to this effect at said page, the court said:

> "The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state or for compensation and damages, or in a proper case where the remedy at law is inadquate for an injunction to prevent such wrong and injury, or for a mandamus in a like case to enforce upon the defendant the performance of a plain legal duty purely ministerial—is not within the meaning of the Eleventh Amendment an action against the state."

Long v. Rasmussen, 281 Fed. 236, was decided by Mr. District Judge Bourquin of the District Court of Montana on May 29, 1922. In said suit, which was one in equity against the Collector of Internal Revenue for the

District of Montana, plaintiff alleged that she was the owner of and entitled to the possession of certain property which she claimed had been unlawfully distrained by the defendant, Collector of Internal Revenue, to collect certain revenue taxes assessed against one, Wise, and plaintiff sought to enjoin the threatened sale and to recover possession of the property as being her own.

Just as in the suit involved in this appeal, the United States was not made a party defendant, but the Collector of Internal Revenue being the one who was committing the trespass to plaintiff's right was made the sole and only defendant. It was claimed, just as it is here, that it was a suit in which the United States was a necessary and indispensable party defendant, and that therefore the suit could not be maintained. In disposing of said question adversely to the Collector of Internal Revenue, District Judge Bourquin said at pages 237-8 of the opinion:

> "The suit is not against the United States, but is against an individual who, as an officer of the United States in the discharge of a discretionless ministerial duty, upon plaintiff's property is committing without authority, contrary to his duty, and in violation of the due process of the Constitution, and the revenue laws of the United States, positive acts of trespass for which he is personally liable." (Citing Philadelphia Co. v. Stimson, 223 U. S. 620; Belknap v. Schild, 161 U. S. 18, and Magruder v. Association, 219 Fed. 78.)

In *Wells v. Nickles,* 104 U. S. 444, Mr. Justice Miller, who later wrote the opinion in U. S. v. Lee, supra, said at pages 446-7:

> "That the lumber when first seized by the timber agents was the property of the United States is not denied. It was, therefore, held by them as agents of the government at the time Wells sued not to replevy it, but to enjoin them from selling it and to deter-

> mine his right to it. If, as he maintained, they were seizing and attempting to sell and deliver as public property that which was lawfully his, we know of no principle of law which forbade him to bring them before a legal tribunal. Their authority to act for the government, and the ownership of the property which they asserted a right to seize, were questions, eminently proper to be decided by a court, especially a court of the United States. If it were otherwise, all the property of the citizens of this vast country would be held at the pleasure of anyone bold enough to assert that it is government property and he a government agent."

In *Osborn v. United States Bank,* 22 U. S. 737, which is also one of the celebrated and leading cases dealing with the question herein involved, and decided by no less a distinguished Justice of the Supreme Court of the United States than Mr. Justice Marshall, it was held that where the rights and interests of a state were concerned such state should be made a party defendant if it could be done. It was further held, however, in said case that if the state could not be made a party that was a sufficient reason in and of itself for the omission to do it, and that the court could proceed to a decree against the officers of the state in all respects as if the state were a party to the record.

Goltra v. Weeks, 271 U. S. 536, was a suit in equity to enjoin the seizure of a fleet of towboats and barges by the Secretary of War and Chief Engineer of the United States. The District Court in which the suit was first tried restored the fleet to Goltra and enjoined the defendant officers of the federal government as prayed for, but the Circuit Court of Appeals reversed the action of the District Court on the ground that the United States was a necessary party defendant and could not be sued in such a suit. The opinion of the Supreme Court of the United

States was rendered by Mr. Chief Justice Taft. At page 544 of said opinion the learned Chief Justice says:

> "We cannot agree with the Circuit Court of Appeals that the United States was a necessary party to the bill. The bill was suitably framed to secure the relief from an alleged conspiracy of the defendants without lawful right to take away from the plaintiff the boats of which, by lease or charter, he alleged that he had acquired the lawful possession and enjoyment for a term of five years. He was seeking equitable aid to avoid a threatened trespass upon that property by persons who were government officers. If it was a trespass, then the officers of the government should be restrained whether they professed to be acting for the government or not. Neither they nor the government which they represent could trespass upon the property of another, and it is well settled that they may be stayed in their unlawful proceeding by a court of competent jurisdiction even though the United States, for whom they may profess to act, is not a party and cannot be made one. By reason of their illegality, their acts or threatened acts are personal and derive no official justification from their doing them in an asserted agency for the government. The point is fully covered in Philadelphia Co. v. Stimson, 223 U. S. 605."

The court then proceeds to quote with approval from said case of Philadelphia Co. v. Stimson the exact language therefrom which we have heretofore inserted in this brief.

In *Cunningham v. Macon R. R. Co.,* 109 U. S. 446, still another case decided by Mr. Justice Miller, the court said at page 452:

> "Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government. In these cases he is not sued as or because he is the officer of the government, but as an individual, and

> the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him." (Citing Mitchell v. Harmony, 13 How. 115; Bates v. Clark, 95 U. S. 204; Meigs v. McClung, 9 Cranch. 11; Wilcox v. Jackson, 13 Pet. 498; Brown v. Hager, 21 How. 305; and Grison v. McDowell, 6 Wall. 363.)

Thornhill Wagon Co. v. Noel, 17 Fed. (2d) 407, is the only reported decision we have found wherein a suit in equity was filed against a United States Income Tax Collector to cancel and set aside an income tax waiver similar to the one involved in this present suit. It was held by District Judge Groner in said suit that the collection of the income tax involved therein was undoubtedly barred by the statute of limitations. Speaking to the point which we are now discussing, namely, whether a United States court has jurisdiction in equity to hear and determine the validity of an alleged income tax waiver, and as to whether the United States is in such a suit a necessary and indispensable party defendant, the court said, as shown at pages 409-10:

> "Under these circumstances this court as a court of equity is perhaps alone clothed with authority to cancel the waiver which in an action at law for a recovery, after complainant has paid the tax, the law court might be wholly without power to reform or cancel. I do not think the United States are a necessary party. Goltra v. Weeks, 271 U. S. 536."

In said suit there was a motion for a temporary injunction and also a motion to dismiss the bill of complaint. The motion to dismiss the bill of complaint was upon the same grounds as those which are asserted by appellees in this suit. The motion for a temporary injunction was denied, but the said motion to dismiss, which presents the question we are here now discussing, was continued for

re-argument. Said case is not further reported, so there is no official record by written opinion as to what final conclusion Judge Groner reached.

We have since the trial of this suit in the District Court written to the attorneys of record for the plaintiff taxpayer in said suit and have received a letter from them in which they state that upon a re-argument on the motion to dismiss the bill of complaint Judge Groner adhered to his previous ruling: that the suit was properly maintainable in equity; that the federal court had jurisdiction; and that the United States was not a necessary party. Said attorneys have further advised that after Judge Groner intimated that he would so hold, the suit was amicably settled to the satisfaction of all concerned, with the result that there is no official record of the precise final ruling made by the court on the point in question.

The principle for which appellant contends on this branch of the case was reiterated in that group of decisions of the Supreme Court of the United States known as the Virginia Coupon cases, viz: *Poindexter v. Greenhow,* 114 U. S. 270, 5 S. Ct. 903; *Chappin v. Taylor,* 144 U. S. 309, 5 S. Ct. 925; *Allen v. R. R. Co.,* 114 U. S. 311, 5 S. Ct. 925; *McGahey v. Virginia,* 135 U. S. 662, 684, 10 S. Ct. 972.

In those cases certain coupons were made legal tender for the payment of governmental taxes. Upon tender of these coupons for the payment of such taxes they were refused by the tax collectors, and the taxes were declared delinquent and distraint proceedings were taken against the taxpayers' property, which, in some cases, was about to be sold to realize the tax, and in other cases the tax was collected on such proceedings in money.

The suits were brought to prevent the carrying out of the distraint proceedings and to recover what money had been collected. The same objection was there made as is made here that the taxes and the property taken to satisfy them were government property and the suits were therefore against the government and could not be maintained.

In the last of the group of cases above cited, viz: McGahey v. Virginia, supra, Mr. Justice Bradley said that any coupon holder who tenders them in payment of his taxes is entitled to be free from molestation as to his property, and if distrained he may (quoting from the opinion)

> "vindicate such right in all lawful modes of redress —*by suit to recover his property,* by suit against the officer to recover damages for taking it, by injunction to prevent such taking."

In these cases what the officers did was for the use and benefit of the government, yet, their acts being unlawful, the government gained no right or interest in the property of the taxpayers.

There is no possible distinction, in principle between, for example, on the one hand, the Lee case, the Virginia Coupon cases and the Stimson case, and, on the other hand, this case. In this case whatever right the government had to the alleged waiver or to the rights or privileges, it was designed to confer, was obtained solely by and through the admitted fraudulent acts of its agents. It being true, as declared by the Supreme Court of the United States, that the government acquired no rights whatever in the property and rights unlawfully procured by its agents for its benefit, by what process of reasoning can it be said that in this case the government does acquire a right by and through the admittedly fraudulently acts of its agents?

The only attempt made in the District Court to dis-

tinguish the cases on which we rely was to say that they are cases where injunction was sought against the agents themselves, as though that changed the principle in any way. There is nothing in that attempted distinction, because whether the suit be to prevent the agent's unlawful act or to undo and annul the act after its accomplishment, the turning point, the gist of the controversy in either case is the government's right to the property or thing involved. As stated in the Lee case, the suit may be maintained although "the judgment must depend upon the right of the United States to the property held by such persons as officers or agents of the United States."

It would, indeed, be a strange and illogical principle that could permit the injured party to restrain a governmental officer from wrongfully seizing his property, and afford him no relief if that officer had so far proceeded as to have actually taken possession of his property. As a matter of common sense the principle must be the same whether injunction is sought to prevent an illegal act, or some other equitable relief is applied for to annul and set aside the effect of such illegal act. The distinction urged by appellees, therefore, that the principle of the Lee case applies only to injunction proceedings and not to proceedings to annul the effect of the fraud or trespass, is illogical and unsound.

In concluding our references to and quotations from authorities sustaining appellant's contention that the United States is not a necessary and indispensable party defendant to this suit, we beg leave to direct the court's attention to the case of Baker v. Swigart, 196 Fed. 569. This was a suit against certain officers of the United States government to restrain acts claimed to be without authority of law and by which complainant was deprived

of rights accorded to him by law. In said suit it was contended that it was in reality a suit against the government. The decision of the court, which was adverse to said contention, was by Mr. District Judge Rudkin, who is at the time of the writing of this brief a member of the United States Circuit Court of Appeals for the Ninth Circuit, to which this brief is addressed. We are gratified to learn that the principles for which we are contending in this branch of our brief in this suit are fully sustained by Judge Rudkin. He, in fact, cites as authorities a number of the cases upon which we rely and to which we have hereinbefore referred, including said leading case of U. S. v. Lee, 106 U. S. 196, which we have hereinbefore stated has never been receded from.

With respect to the claim that the United States government was a necessary and indispensable party defendant, Judge Rudkin said at page 571:

> "The respondents claim that this is in effect a suit against the government. If the position taken by the complainant is sound, and the respondents without authority of law are attempting to deprive him of rights accorded to him by the law, the claim that this is a suit against the government is utterly unfounded. U. S. v. Lee, 106 U. S. 196; Pennoyer v. McConnaughy, 140 U. S. 1; Reagan v. Farmers Loan & Trust Co., 154 U. S. 362; Belknap v. Schild, 161 U. S. 18; Scott v. Donald, 165 U. S. 107."

In view of the admitted facts that appellees acted unlawfully and wrongfully and fraudulently, and practiced duress and intimidation and coercion upon the secretary of appellant, and all of the decisions of the courts to which we have heretofore referred, holding that in such a situation the government is not legally responsible for the unauthorized and unwarranted and illegal acts of its officers, and in view of the unbroken line of authorities, holding

that government officers and agents are in such instances personally liable and responsible and must, by their own efforts, and independent of the support or protection of the government, under whose guise they acted, justify their conduct and relieve themselves from the dilemma in which they find themselves placed by their unlawful and wrongful and tortious conduct and action contrary to and in excess of the authority granted to them by law, we feel confident that this court will not hold that the United States government is a necessary and indispensable party defendant to this suit, because the effect of so holding will be to deny to appellant the right to the relief it is equitably entitled to from appellees.

To say that appellees are immune from having their said wrongful and unlawful acts questioned and relieved against merely because they happen to be clothed with a little brief authority in behalf of the federal government, is a travesty upon and a denial of justice. It should not be said that appellant is debarred of remedy because it has not joined as a defendant a party who is not responsible or legally liable under the law and against whom appellant has no grievance. It is appellant's contention that appellees committed the wrong and that appellant should be relieved of any ill effects or detriment flowing from such wrongful conduct, and appellant confidently believes that this court will not permit the United States government to claim any benefit or advantage derived or accruing from said alleged waiver agreement when the fact is, as is admittedly established by the record in this suit, that said alleged waiver agreement rests upon fraud and the excess of and an unwarranted usurpation of official power and authority.

The District Court from whose final decree this ap-

peal is prosecuted based its final decree very largely, if not entirely, upon the two cases of Minnesota v. Hitchcock, 185 U. S. 373, and Oregon v. Hitchcock, 202 U. S. 62, but said decisions are not in point or applicable here, and are clearly distinguishable from the situation presented by this record in the following particulars:

There is a great difference between a suit to compel a transfer from the United States of property, the title to which is admitted to be vested in the government, and a suit to prevent the transfer by fraud of property, or rights to the government. The two cases relied on by the District Court are of the former class. This case and the decisions on which we rely are of the latter class.

Both of the Hitchcock cases, supra, involved lands of the United States, and the object of one was to cause the conveyance thereof to the State of Minnesota under the School Land Grant. The title to the land was admittedly vested in the government. The object of the other suit was to cause a conveyance of lands of the government to the State of Oregon under the Swamp Land Act, the title being admitted to be vested in the government. It was correctly held that to any proceeding for the divesting of the government of any of its property the government was a necessary party, and that therefore the suits were against the government and could not be maintained.

In this suit, on the other hand, it is admitted that the waiver was procured by the fraud and trespass of the appellees. This is an admission that the government has no right or title thereto and is not interested therein.

In Minnesota v. Hitchcock, supra, Mr. Justice Brewer said:

> "Now the legal title to these lands is in the United States. The officers named as defendants have no

> interest in the lands or the proceeds thereof. The United States is preparing to sell them. This suit seeks to restrain the United States from such sales —to divest the government of its title, and vest it in the state."

In Oregon v. Hitchcock, supra, Mr. Justice Brewer said:

> "Again it must be noticed that the legal title to all these tracts of land is still in the government."

On the other hand, in this suit, the exact reverse of that situation exists. Here the government officers are attempting to take from appellant by fraud that which is admittedly the property and right of appellant, and vest it in the government. The government has always refused to be a party to such frauds and refuses to recognize or acknowledge the agency of its officers when so unlawfully acting.

The District Court, from whose final decree this appeal is prosecuted, labored under the misapprehension that this suit involved the right or title to government property of the United States, but as we have heretofore shown and pointed out the alleged waiver agreement which appellant seeks to have canceled and set aside is not in fact property at all—it is a nullity. It is void upon its face, and it is ineffectual not only because it was procured by fraud and duress and unlawful conduct on the part of appellees, but because it was exacted at a time when the collection of any further taxes for the year 1918 had expired and the tax debt itself had been extinguished by the statute of limitations. The statute of limitations for the collection of any further taxes from appellant for said year 1918 expired on May 9, 1924, and the tax debt was then extinguished, and therefore the said alleged waiver agreement is void upon its face. It cannot be said to be

property, much less can it be said to be property belonging to the United States government, because it was obtained under such admitted circumstances as that the United States government cannot be heard to sanction its execution or claim any benefit or advantage from it.

Analogous to the said reasoning and conclusion of the District Court was its assertion in rendering its decree herein that it must be assumed that said alleged waiver agreement has a face value, and that such face value belonged to the United States government. The District Court, and in fact no court, has a right to assume anything contrary to the established facts, and, as we have hereinbefore pointed out, the material allegations of the bill of complaint show that said alleged waiver agreement is utterly void and of no value whatsoever, and the motion to dismiss the bill of complaint admits, as would a demurrer, all of the material allegations of the bill of complaint, and to say, therefore, that the alleged waiver agreement has a face value, when it is conclusively established by the record that it has no value at all, and to say or to hold that it has a value belonging to the United States government is to do violence to all rules of pleading and well established law.

In concluding our argument on this branch of this appeal we will refer to one other matter which seems to have actuated the District Court in arriving at its final decree herein, and that is the said court's unwarranted conclusion that the United States government was the only person who could possibly have any interest in this suit, and that whatever the appellees did was done in their official capacity and for the benefit of the federal government, solely, and not in anywise to exculpate or benefit themselves.

As we have heretofore pointed out and shown from

authorities, it is never an excuse or justification for a government officer or agent that he acted in behalf of his principal, the government, if the facts are that he exceeded his powers and violated and went beyond the authority vested in him, and where such accusation is made against him he must justify and prove that he acted within his authority.

In this connection we further call the court's attention to the fact that the appellees herein have a very vital and substantial and pecuniary interest in the outcome of this suit, because under the statutes of the United States, to-wit: Sections 3148, 3182, 3183 and 3187 of the Revised Statutes and the Act of February 8, 1875, c 36, Section 12, 18 Stat. 309, they are personally liable and responsible to the government for the collection of income taxes accruing within their district, and they must collect the said taxes efficiently and punctually, and should they fail and neglect so to do they are liable to the United States for their omission.

It was because appellees had a very vital interest in the collection of said income taxes that they exacted and procured from the secretary of appellant the said alleged waiver agreement, because at the time they wrongfully and unlawfully procured the same the statute of limitations had already run against the collection of any further taxes from appellant for said year, 1918, and having allowed the statute of limitations to run against said tax appellees were vitally interested in obtaining, if possible, some paper whereby they could, if possible, restore and revive the collection of further taxes, and not only were they not disinterested, but they were exceedingly and vitally and financially interested in exculpating themselves from their own laches and negligence in failing to collect

for the United States further taxes, if such, if any, were due.

There can be no question upon the admitted facts disclosed by the record that the United States is not a necessary or an indispensable party defendant to this suit and that the sustaining of appellees' motion to dismiss appellant's bill of complaint upon that ground was unwarranted and unjustified.

(D) *The alleged waiver agreement of date September 26, 1925, is void and ineffectual and a nullity upon its face.*

In appellant's bill of complaint it is alleged that at the time of the wrongful issuance and service of said distraint warrant upon appellant and the obtaining of the signing of said alleged waiver agreement dated September 26, 1925—being the waiver agreement appellant seeks to have canceled—the collection of any balance of taxes assessed for said year, 1918, or any further taxes for said year was barred by the statute of limitations. Said allegations were made in inducement of and to accentuate and establish, beyond question, the further allegations of said bill of complaint that fraud and duress were practiced in procuring the execution of said alleged waiver agreement and to negative any suggestion or contention that the United States government has any property right or interest in said alleged waiver agreement and said allegations, if true, show that said alleged waiver agreement is void and a nullity upon its face and should for that reason alone, be canceled.

Said alleged waiver agreement was fraudulently procured by appellees from appellant's secretary by duress and coercion in the vain hope that it would revive and vitalize

and permit the collection of income taxes already dead and long outlawed and barred by the statute of limitations. Said alleged waiver agreement attempted—at a time when collection was already barred—to permit assessment and collection up to December 31, 1926.

At the time of its execution—September 26, 1925—the admitted situation with respect to the income taxes of appellant for the year 1918—the subject matter of said waiver—was as follows: an income tax return had been duly filed by appellant on May 9, 1919, and taxes had been assessed thereon first, by an original assessment, dated July 24, 1919, and later by an additional assessment, made February 8, 1924, both assessments being made within five years from the date of the filing of the return. No additional or other assessments or determination of taxes due or claimed to be due under said return for 1918 were ever made.

Whether or not by consent or agreement between the commissioner and the taxpayer the right, on the part of the commissioner, to make and collect other additional assessments was preserved is wholly immaterial. The subject matter of the waiver in question, being the alleged waiver of date September 26, 1925, is the assessments made, as before stated, within five years of the filing of the said income tax return.

The revenue acts of the United States applicable to the collection of income taxes for said year 1918, under said return filed on May 9, 1919, are the revenue act of 1918, c. 18, 40 Stat. 1057, 1083; the revenue act of 1921, c. 136, tit. 11, "Income Tax", 42 Stat. 227, 265, and the revenue act of 1924, passed June 2, 1924, c. 234, tit. 11, 43 Stat. 253, 299, 300, 301, 303 and 352, all of which said revenue acts are referred to and construed in the case of Russell

v. United States, 49 Sup. Ct. Rep. 121, hereinafter referred to.

Under said revenue acts the period of time within which said assessments already made on said return for 1918 or within which any further income taxes for said year could be legally collected expired on May 9, 1924, or five years after the said filing on May 9, 1919, of the income tax return for said year. So as matters stood on September 26, 1925, the date when the alleged waiver agreement, which appellant seeks to have canceled, was executed, any right of the United States to collect on said assessments already made or to collect on any further assessment for said year 1918, was completely barred and at an end.

It is a well established principle of law that where a liability is created by a special statute and in the said special statute, creating such liability, a time is fixed within which such liability may be asserted and enforced, that such assertion and enforcement of liability must be effected within the precise time limited and prescribed by the statute, otherwise the provisions of the statute not only bar the remedy but also entirely extinguish the liability. In re Harrisburg, 119 U. S. 199, 214 and Danzer v. Gulf R. R. Co., 268 U. S. 633. And this declaration of already existing law was expressly written into the revenue act of 1926, in section 1106 (a) thereof. See revenue act of 1926, Act Feb. 26, 1926, C. 27, Sec. 1, 44 Stat. 9.

The first case, construing the revenue acts here involved to which we direct the Court's attention is *U. S. v. Cabot, decided June 15, 1926, and reported in 5 Am. Fed. Tax Rep. 6172.* That was a suit brought by the United States to collect from defendant alleged unpaid balances

of income taxes for the year 1919. It there appeared that although the suit was brought about three years and five months after the assessment was made *it was not brought until after more than five years had expired from the date of the filing of the return for said year.* The court held that further collection was absolutely barred by the statute of limitations.

It was contended by the government that by virtue of the revenue act of 1924 it had six years from the date of the assessment within which to collect the tax but the court held, and properly so, that the revenue act of 1924, enacted on June 2, 1924, had no retroactive effect and that as five years and seven months and eighteen days had elapsed between the time when the assessment was made and the suit was filed, the statute of limitations had run and that no added time was given by said revenue act of June 2, 1924.

In *U. S. v. Whyel,* 19 Fed. (2d) 260, said Cabot case was referred to and approved and it was held in conformity to the ruling in said Cabot case that an assessment made prior to the passage of the said revenue act of 1924 was in no way affected or governed thereby. At page 264 the Court said: "In the case before us the return and assessment were made prior to the passage of the act of 1924, and, although made within the statutory period of five years, no action was begun for nearly one year later —many months beyond the five year limitation. For this reason, plaintiff's action cannot be maintained, because of the bar of the statute."

Prior to the decisions of the lower courts in the case of Bowers v. Albany Lighterage Co. the internal revenue department of the United States apparently labored un-

der the misapprehension that it was *proceedings in Court,* only, that must be begun within five years from the date of the filing of the income tax return and that if the assessment was duly made within the five year period, collection, by distraint, could be effected at any time later. It was undoubtedly this erroneous conclusion and view of the law which caused appellees herein to permit the collection from appellant of any further income taxes for said year 1918, if aught were due, to become barred by the statute of limitations and when they suddenly discovered that collection even by distraint might be barred they unlawfully and fraudulently procured the execution of the alleged waiver agreement which appellant seeks to have canceled.

The decisions of the lower courts in said Bowers case were affirmed by the Supreme Court of the United States on February 21, 1927. The decision is reported in 273 U. S. 346; 47 Sup. Ct. Rep. 389. In its said decision the Supreme Court of the United States held that the collection of income taxes for the years 1916 and 1917 was barred by the statute of limitations because proceedings were not begun within five years from the date of the filing of the income tax returns for said years and the Court expressly held, and this was the particular point of the case, that the expression, "proceedings", in the revenue statute refers to and comprehends not only actions or suits in Court but distraint, as well, and that both court action or suit and distraint must be had within five years from the date of the filing of the income tax return.

The revenue acts governing the collection of income taxes for the year 1918, insofar as the same relate to the period of limitations are the same as those governing the

collection of income taxes for the years 1916 and 1917, so that, said Bowers case is an unquestionable authority for the legal proposition that the collection, either by court proceedings or distraint, of income taxes for the year 1918 must be begun within five years from the date of the filing of the income tax return, otherwise collection is barred and extinguished by the statute of limitations.

On September 25, 1925, when the distraint warrant was issued and served, and on September 26, 1925, when the alleged waived agreement involved in this suit was executed, the collection of the said original tax and of the said additional tax, which was the subject matter of said warrant and waiver, had been and were barred and extinguished by the limitations prescribed by the existing revenue acts. The alleged waiver was therefore void and ineffectual and the United States government acquired no property or other rights or interests therein or thereunder.

Said alleged waiver agreement is not the consent agreement authorized by section 278 (c) of the said revenue act of 1924 but instead is an attempt to cure the department's error as to assessments already made. The waiver authorized by the various revenue acts is the mutual consent of the Commissioner and taxpayer that an assessment may be made and collected after the expiration of the limitation period. But no revenue act has ever authorized the waiver by the taxpayer of the benefit of the bar of the statute of limitations *after* the limitation period has fully expired. And that is what the alleged waiver involved herein purports to do. It was obtained to relieve the Collector of his personal liability for failing to collect the tax in time. The alleged waiver and its effects were and are, therefore, personal to the appellees.

Under date of January 22, 1924, appellant signed the

income and profits tax waiver which is set forth at pages 7 and 8 of the transcript of record. Said waiver provides for additional time within which assessments might be made with respect to said 1918 income taxes of appellant and purports to extend beyond the statutory period of limitation the time within which assessments of taxes for said year might be made, but, in no event, beyond March 15, 1925. Nothing appears to have been done under said waiver. It was not essential to the said additional assessment of date February 8, 1924, because that assessment was made within five years from the date of the filing of the income tax return and did not depend for its validity upon said last mentioned waiver agreement.

Nothing is said in said last mentioned waiver agreement about any extension of time within which to effect collection. It appears to relate to *assessments* of taxes, only. But should it be contended and the contention be sustained that said last mentioned waiver agreement extends, also, the time of collection it does not, in any event, extend such time of collection beyond the time limit definitely and specifically fixed therein, to-wit: March 15, 1925, and, as heretofore explained and set out, it was not until more than six months after said March 15, 1925, or until September 25 and 26, 1925, that said distraint was issued and the waiver agreement, sought to be avoided, exacted.

So that whether you take the time limit for collection as being five years from the date of the filing of the income tax return—or five years from May 9, 1919, which would be May 9, 1924—or whether you take the time limit to be March 15, 1925, in either event the taxes for 1918 were barred and extinguished. The distraint was made neither within five years from the date of the filing of the

return nor within the time specified in said waiver agreement dated January 22, 1924.

A case squarely in point on this subject is that of *Hood Rubber Co. v. White,* 28 Fed. (2d) 54. In that case, which involved income taxes for the years 1918 and 1919, a waiver was signed by the taxpayer allowing the government an additional one year or six years in all to assess and collect the taxes. The completed return was filed on July 14, 1919, and it was not until December 15, 1926, or more than six years thereafter that distraint was issued and the taxes collected. The government contended that it was not limited to the precise time specified in the waiver but that it could take advantage of the six year period of collection provided for in the later revenue act of 1924.

In ruling adversely to the government's said contention and in holding that the time for collection of the taxes was entirely governed by the terms of the waiver the court said at page 55:

> "The government's contention that the waiver did not limit the time of collection of the tax to six years is unsound. The government takes advantage of the six year period for assessment, and then says that the six year period for collection was changed by the later statute of 1924 (26 U. S. C. A., Sec. 1061), which allowed six years after a valid assessment for collection. The government cannot have its cake and eat it too. Either the waiver conferred no power on the government to make the assessment later than the statutory period allowed, or it set up a six year restriction on collection as well as assessment. It is distinctly unfair for the government to take advantage of one part of the waiver and refuse to be bound by the other part of it."

Although at the time this suit was instituted, to-wit: on December 28, 1927, it was a doubtful or mooted ques-

tion whether a waiver of the statute of limitations prescribed by the internal revenue acts, made at a time when the prescribed limitation had already expired, was valid or effectual or not it has, since the filing of this suit, been judicially declared, in accordance with appellant's contentions, that a waiver so obtained is absolutely void and ineffectual for any purpose whatever and said mooted question has forever been put at rest. We refer to the three cases of *Joy Floral Co. v. Commissioner of Internal Revenue,* 29 Fed. (2d) 865, decided December 3, 1928; *Russell v. United States,* 278 U. S. 181; 49 Sup. Ct. Rep. 121, decided by the Supreme Court of the United States on January 2, 1929, and *Rasmussen v. Brownfield Carpet Company,* Vol. IV. No. 8—U. S. Daily—issue of March 12, 1929, page 8, decided by the United States Circuit Court of Appeals for the Ninth Circuit on February 11, 1929. We will refer briefly to each of said decisions, all holding squarely and unequivocally that an alleged waiver agreement such as appellant seeks to have set aside by this suit is void and ineffectual and a nullity.

In *Joy Floral Co. v. Commissioner,* 29 Fed. (2d) 865, involving, as here, income taxes accruing under the revenue act of 1918, the taxpayer's return was filed on October 15, 1919, and a deficiency assessment made July 15, 1925—more than five years later. The taxpayer contended that the Commissioner possessed no lawful authority to make the assessment after the lapse of five years from the filing of the return and that the assessment was therefore illegal. It was disclosed that the commissioner and the taxpayer consented in writing that the commissoner might make an assessment upon the return notwithstanding the lapse of the five year period but just as in the present suit it further appeared that the writing was

not executed *until after the lapse of the five year limitation.*

The Board of Tax Appeals held that the consent was valid and effective and sustained the assessment but the Court of Appeals of the District of Columbia reversed this ruling and held that such consent or waiver agreement to be valid must be made *prior* to the expiration of the statute of limitations, saying, among other things, at page 867: "It is unreasonable to believe that Congress felt it necessary to provide a remedy whereby taxpayers may restore to the commissioner the right to assess income taxes upon their returns *after* the statute of limitations has deprived the commissioner of authority to make any assessment thereon."

Russell v. United States, 278 U. S. 181; 49 Sup. Ct. Rep. 121, involved, as does this appeal, an income tax assessment for the year 1918. The salient dates were: income tax return filed June 12, 1919; assessment made in March, 1924, but suit was not filed to collect tax until January 23, 1925—more than five years after the filing of the return. All of the internal revenue acts bearing upon the collection of income taxes for said year, 1918, are referred to and construed in the decision in said case. The Court held that the time within which a suit might have been brought to collect any additional taxes for said year, 1918, expired on June 12, 1924—five years after the return date.

It was contended by the government that the internal revenue act of 1924 extended the time within which suit might be brought to March, 1930—six years after the assessment. It appeared, however, that the assessment had been made *prior* to the passage of the act of 1924 and it was held that said act had no retroactive effect and did not

extend the time for collection beyond the period limited by the former internal revenue acts.

The situation presented by said Russell case and this suit are in all respects identical. Both cases relate to income taxes for the year, 1918, and in both cases the assessments of taxes for said year were made and the collection of the tax thereon accrued *prior* to the date of the passage of said act of 1924, which was on June 2, 1924. Said Russell case is a square holding to the effect that the collection of income taxes for the year, 1918, is, irrespective of any provisions of any subsequent internal revenue acts, absolutely barred and extinguished five years after the date when the income tax for such year is filed.

Applying said decision of the United States Supreme Court in said case of Russell v. United States, 278 U. S. 181; 49 Sup. Ct. Rep. 121 to the suit at bar, we find that the collection from appellant of any further income taxes for said year, 1918, was long previous to September 26, 1925, absolutely barred and extinguished by the statute of limitations and it, therefore, follows that said alleged waiver agreement of date September 26, 1925, was void upon its face and ineffectual for any purpose.

At the time said alleged waiver agreement was signed the collection of any further income taxes for the year, 1918, was already barred by the statute of limitations. The return had been filed on May 9, 1919, and two assessments had been made thereon, both ante-dating the passage of the revenue act of 1924. Although on January 22, 1924, a waiver agreement was signed extending the time to file additional assessments to March 15, 1925, nothing was done thereunder. The distraint and waiver, which forms the basis and subject matter of this suit, were not issued or executed until September 25 and 26, re-

spectively, 1925, which was not within five years from the date of the filing by appellant of its income tax return for said year, 1918, and was long subsequent to said extension date of March 15, 1925.

As the assessments were made previous to the date of the passage of the internal revenue act of 1924 and as held in said Russell case said act has no retroactive effect, the collection from appellant of any further income taxes, if due, for said year, 1918, was absolutely barred and extinguished five years from the date of the filing of its income tax return for said year or on May 9, 1924, rendering said alleged income tax waiver of date September 26, 1925, void upon its face.

We are pleased to be able to refer to and quote from a recent decision to the same effect as the said Russell case. It was decided by the United States Circuit Court of Appeals for the Ninth Circuit—the very Court to which this brief is addressed. We refer to the case of Rasmussen v. Brownfield Carpet Company, reported, at the time of the preparation of this brief, in Volume IV U. S. Daily, No. 8, issue of March 12, 1929, at page 8. The decision was by Mr. Circuit Judge Gilbert, specially concurred in by Judges Rudkin and Dietrich.

It was held in said case that the taxpayer was entitled to recover from the Internal Revenue Collector against whom the proceeding was brought, certain income taxes previously paid under protest, the basis of the ruling being that the distraint proceedings were barred by the statute of limitations and the collection of the taxes illegal.

It appears from the opinion that two income tax returns were filed for the year ending January 31, 1919, a tentative return on March 15, 1919, and a complete return on June 16, 1919. The warrant of distraint was is-

sued six years and one day after the first return was filed and five years and nine months after the second return was filed. It was held in the main opinion that the collection of the income tax in question was barred by the statute of limitations five years after the date of the filing of the original return and that as the assessment had been made prior to the passage of the internal revenue act of 1924, the provisions of the latter did not apply or extend the period of limitation.

In concurring specially Judges Rudkin and Dietrich expressed no opinion upon the question whether the statute of limitations began to run upon the filing of the tentative return of March 15, 1919, but were emphatic to the effect that the said decision of Russell v. United States, supra, was controlling, saying:

> "If it be assumed that the period of limitations commenced to run on June 16, 1919, the date of the filing of the complete return, under the rule of Russell v. United States (Dec. Supreme Court, January 2, 1929) (III U. S. Daily 2706) distraint proceedings were barred and the collection of the tax was illegal."

Most of the decisions to which we have referred in the development of our argument that the alleged waiver agreement, sought to be canceled, is void upon its face, have been rendered *since* the institution of this suit, the same having been commenced at a time when said matter was not entirely free from doubt. If this court should be of opinion, based upon said decisions, that the alleged waiver agreement of September 26, 1925, is null and void and of no effect on its face because it was executed at a time when the statute of limitations had not only barred the remedy but also extinguished the liability, it may lead to an affirmance, on that ground, of the decree appealed

from, because it may be contended that, inasmuch as said alleged waiver is void on its face, a resort to equity to set it aside is unnecessary.

But, as stated at the beginning of this argument, appellant would be willing to acquiesce in an affirmance of the decree appealed from, *provided,* it is based upon the ground that said alleged waiver is void on its face and this Court so declares. Appellant commenced this suit and is prosecuting this appeal with a view to thereby removing said alleged waiver which stands as an impediment to appellant's just and well-founded claim and contention that the said income tax assessments are barred and extinguished by the statute of limitations.

Appellant seeks a judicial determination—in some form—decreeing and stating that said alleged waiver is ineffectual and it is immaterial to appellant whether the decree appealed from be affirmed or reversed, provided, it is judicially declared and stated that said alleged waiver is void and of no effect. Should this Court entertain the view that said alleged waiver is void upon its face and that hence this suit is unnecessary, we earnestly ask that in the opinion rendered this reason be fully expressed.

CONCLUSION

In conclusion and by way of a brief summary of the position of appellant, which finds itself confronted with an alleged waiver as an effectual means of removing the bar of the statute of limitations and of compelling it to pay, by way of asserted additional income taxes and interest and penalties, large sums of money, which it has always justly felt and contended were and are not due or

owing from it but being wrongfully demanded and exacted, appellant contends:

That as the motion to dismiss the bill of complaint conclusively admits that the alleged waiver was obtained by fraud and duress and under such circumstances as make appellees' procurement of it illegal and unauthorized, the United States is not a necessary or indispensable party to this suit; that the alleged waiver is null and void and ineffectual upon its face because procured at a time when the statute of limitations had already run and the collection of further taxes for the year, 1918, was barred and extinguished and that the final decree of the District Court dismissing the bill of complaint for non-joinder of the United States as a party defendant should be reversed unless an affirmance be ordered upon the ground that said alleged waiver is void upon its face, rendering the prosecution of this suit unnecessary.

Respectfully submitted,

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D. J. MALARKEY,

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E. B. SEABROOK,

.....

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STATE OF OREGON, ss.

County of Multnomah

I, A.M.Dibble, one of the attorneys and solicitors for appellant, do hereby certify that I have prepared the within and foregoing copy of Appellant's Brief in the within and foregoing cause and have carefully compared the same with the original thereof; that it is a correct transcript therefrom and of the whole thereof.

Portland, Oregon, dated the 29th day of April, 1929.

A M Dibble

Of Attorneys and Solicitors for Appellant.